Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-889

FRANCIS H. MALONEY, Commissioner of Children and Youth Services of the State of Connecticut
Appellant,

v.

LADY JANE, ET AL
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

JURISDICTIONAL STATEMENT

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No.

FRANCIS H. MALONEY, Commissioner of Children and Youth Services of the State of Connecticut
Appellant,[1]

v.

LADY JANE, ET ALS
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of a three-judge United States District Court for the District of Connecticut entered on October 7, 1976 declaring the Abortion Services regulation of the Connecticut State Welfare Department to be unconstitutional, and permanently enjoining the appellant from refusing written consent to the performance of an abortion desired by any informed minor who is a ward of said Appellant during the first trimester of such minor's pregnancy, and submits this statement to show that the Supreme Court of the United States has jurisdiction and that a substantial question is presented.

Footnote 1. Defendant Edward W. Maher, who joined in the *Notice of Appeal*, filed, on December 10, 1976, a motion to withdraw his appeal in the United States District Court of Connecticut.

OPINION BELOW

The opinion of the three-judge District Court which is the subject of this appeal is not yet reported. A copy of that opinion is contained in this jurisdictional statement at p. 1a.

JURISDICTION

This action was brought by plaintiffs (appellees) under 42 U.S.C. S. 1983 and jurisdiction was based on 28 U.S.C. S. 1343(3) and 28 U.S.C. S. 2281.

The three-judge District Court, after hearing, entered judgment on October 7, 1976 (jurisdictional statement at p. 7a) and notice of appeal was filed in that court on November 2, 1976 (jurisdictional statement at p. 9a).

The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U.S.C. S. 1253. The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case:

United States v. *Georgia Public Service Commission*, 371 U.S. 285
American Federation of Labor v. *Watson*, 327 U.S. 582
King v. *Smith*, 392 U.S. 309.

STATUTES INVOLVED

Section 275, Volume 3, Chapter III, Connecticut Department of Social Services, Public Assistance Program manual is the regulation whose validity is involved in this action. It is set forth on p. 11a of the jurisdictional statement.

QUESTIONS PRESENTED

Under Connecticut's procedure, abortions are granted to minor wards of the Commissioner of Children & Youth Ser-

vices only after written approval has been given by the Commissioner after reports from the child's attending physicians and the report of the Department of Social Services consulting physician. Connecticut law is silent as to the criteria to be followed by the Commissioner in granting or withholding the abortion.

The questions presented by this appeal are:

1.) Is the permanent injunction issued by the U.S. District Court over-broad from a Constitutional standpoint in that it requires the Commissioner to assent in writing to all abortions desired by any informed minor ward who is in her first trimester of pregnancy, regardless of the presence or absence of medical information pertaining to the safety of the abortion.

2.) Is the permanent injunction over-broad in that it effectively takes from the minor ward all guidance and review by her guardian, the Commissioner.

STATEMENT OF THE CASE

The action was commenced, by her next friend, by a minor ward of the Defendant Commissioner of Welfare, who was seeking an abortion in her first trimester of pregnancy. She had been examined by a licensed physician who had agreed to perform the requested abortion provided that the defendant Commissioner gave his consent thereto. Subsequent to the commencement of the action, eleven minor plaintiffs were permitted to intervene in the action. On April 1, 1975 appellant Francis H. Maloney, by statute, became guardian of all minor wards of the State, including all the plaintiffs. (Connecticut General Statutes 17-62(d) as amended by Section 11 of Public Act 74-251). All of the plaintiffs were denied the consent of one or the other defendant Commissioners and each sought and obtained from the District Court

a temporary restraining order requiring the guardian Commissioner to assent in writing to the abortion. Discovery proceedings established that the defendants had no written policy statements or other guidelines than the Abortion Services regulation, Manual Vol. 3, Chapter III, No. 275 (jurisdictional statement p. 11a). The persons who participated in the review of requests for approval of abortion for committed women were, prior to April 1, 1975 the district social worker, case supervisor, program supervisor, Director of Social Services, Chief of Medical Services and Welfare Commissioner. Subsequent to April 1, 1975 those participating were the case worker or social worker, case supervisor, program supervisor, Regional Director, Deputy Commissioner, Welfare Chief of Medical Services (David Galinsky, M.D.) and the Commissioner of Children and Youth Services (jurisdictional statement p. 14a). The answers to interrogatories also elicited the information that requests for abortions were reviewed for medical sufficiency by the Welfare Department physician and that, on occasion, psychiatric and/or psychological examinations were required and obtained.

At the conclusion of discovery proceedings, the plaintiffs moved to certify the case as a class action and for summary judgment. Both motions were granted. On September 21, 1976 the three-judge District Court filed its *Memorandum of Decision* (jurisdictional statement p. 1a); on October 7, 1976 the Court filed its *Judgment* (jurisdictional statement p. 7a) and on November 3, 1976 the appellant filed his *Notice of Appeal* (jurisdictional statement p. 9a).

THE QUESTIONS ARE SUBSTANTIAL

The Supreme Court has ruled that a State may not constitutionally impose a blanket provision requiring the consent of a parent or a person in loco parentis as a condition for abortion of an unmarried minor during the first 12 weeks of

her pregnancy. The Court, however, has not defined the term "blanket" and has held that the State is properly concerned with the medical safety of the proceedings. It has also indicated that the parent or guardian may have a further role in the decision. The judgment of the District Court in this case, eliminates the State's control over proper health measures and, by injunction, virtually eliminates any discretion and control by the guardian. It is vital to the welfare of Connecticut's wards and those in other States that this Court clarify the Constitutional boundaries which pertain to abortion decisions.

THE DISTRICT COURT'S INJUNCTION IS OVERBROAD IN THAT IT DEPRIVES THE MINOR WARDS GUARDIAN OF CONTROL OVER THE MEDICAL SAFETY OF ABORTIONS.

The judgment appealed from orders, *inter-alia* that "the Defendants be and are herby enjoined from refusing written consent to the performance of an abortion desired by any informed minor who is a ward of said Defendants during the first trimester of pregnancy."

Although the injunction is qualified by the word "informed," that term does not offer any protection for the competent minor who knowingly seeks an abortion from an unlicensed abortionist or a licensed practitioner with a dubious reputation. In such a situation the appellant commissioner is faced with the impossible choice of obeying the literal words of the injunction or running a grave risk of being held in contempt. Such a result was surely not intended by this Court in the decided cases.

In *Roe* v. *Wade*, 410 U.S. 113, 150 (1972) the Court observes: "The State has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the pa-

tient. This interest obviously extends at least to the performing physician and his staff, to the facilities involved, to the availability of after-care, and to adequate provision for any complication or emergency which might arise. *The prevalence of high mortality rates at illegal "abortion mills" strengthens, rather than weakens, the State's interest in regulating the conditions under which abortions are performed."* (Emphasis Supplied): In *Rhim* v. *Indiana*, 348 N.E. 2d 620, 622 (1976), the Supreme Court of Indiana, in commenting on *Roe* observes "*Roe* teaches that a State cannot restrict a decision of a woman, with the advice of her physician, to terminate her pregnancy because neither its interest in maternal life or its interest in the fetus is sufficiently great at that stage. *But the insufficiency of the State's interest in maternal health is predicated upon the first trimester abortion being as safe for the woman as normal childbirth at term, and that predicate holds true only if the abortion is performed by medically competent personnel under conditions insuring maximum safety for the woman.* See 410 U.S. at 149-150, 163, 93 S.Ct. at 724-725, 731; *Cheaney* v. *Indiana*, 410 U.S. 991, denying cert to 259 Ind. 138, 285 N.E. 2d 265 (1972)" (emphasis supplied).

It is submitted that Appellant's Department's Abortion Services regulation (jurisdictional statement p. 11a) which the District Court held unconstitutional provided, whatever its other shortcomings, substantial medical safeguards for the minor ward. Under this regulation she was obliged to be examined by a licensed physician and findings and recommendations were subject to review by a licensed physician employed by the State.

As a result of the District Court's action, the minor female wards of the appellant are deprived of any regulation which safeguards their health. Further, the injunction, which requires the appellant, their guardian, from refusing written consent

to an abortion does not permit him to condition that assent on following medically acceptable standards.

THE SUPREME COURT DECISIONS INDICATE THE NEED FOR A GUARDIAN'S INVOLVEMENT IN ABORTION DECISIONS OF MINOR WARDS.

It is submitted that *Planned Parenthood* v. *Danforth*, —— U.S. —— July 1976, 96 S.Ct. 2831, —— L.Ed. 2d ——, does not eliminate all aspects of the conditions under which a guardian may be involved in the decision of his minor ward to have, or not to have, an abortion. The majority opinion in that case holds that "the State may not impose a *blanket* provision, . . . requiring the consent of a parent or person in *loco parentis* as a condition for abortion of an unmarried minor during the first 12 weeks of her pregnancy." 96 S.Ct. 2843 (Emphasis supplied). The Court does not, however, define the perimeters of the term "blanket" and the opinion leaves some questions open. The Court recognizes that "the State has somewhat broader authority to regulate the activities of children than of adults." 96 S.Ct. 2843, citing *Prince* v. *Massachusetts*, 321 U.S. at 170, 64 S.Ct. at 444; *Ginsberg* v. *New York*, 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed. 195 (1968). The Court also states that its holding "does not suggest that every minor, regardless of age or maturity, may give effective consent for the termination of her pregnancy," 96 S.Ct. 2844, citing *Bellotti* v. *Baird*, —— U.S. ——, 96 S.Ct. 2857. That there is a need for a guardian's participation is further indicated by the concurring opinion of Mr. Justice Stewart who states "There can be little doubt that the State furthers a constitutionally permissible end by encouraging an unmarried pregnant minor to seek the help and advice of her parents in making the very important decision whether or not to bear a child. That is a grave decision, and a girl of tender years, under emotional stress, may be ill-equipped to make it without mature advice and emotional support. It

seems unlikely that she will obtain adequate counsel and support from the attending physician at an abortion clinic, where abortion for pregnant minors frequently takes place: 96 S.Ct. 2851. Concern that there be adequate parental guidance is more strongly expressed in the opinion of Mr. Justice White, who states "But the purpose of the parental consent requirement is not merely to vindicate any interest of the parent or of the State. The purpose of the requirement is to vindicate the very right created in *Roe* v. *Wade supra* — the right of the pregnant woman to decide "whether *or not* to terminate her pregnancy, Id, at 153, 93 S.Ct. at 727 (emphasis added). The abortion decision is unquestionably important and has irrevocable consequences whichever way it is made. Missouri is entitled to protect the minor unmarried woman from making the decision in a way which is not in her own best interests, and it seeks to achieve this goal by requiring parental consultation and consent. This is the traditional way by which States have sought to protect children from their own immature and improvident decisions and there is absolutely no reason expressed by the majority why the State may not utilize that method here." 96 S.Ct. 2851. The dissent of Mr. Justice Stevens also strongly supports this view.

THE DISTRICT COURT'S INJUNCTION IS ALSO OVERBROAD IN THAT IT PRECLUDES THE STATE OF CONNECTICUT FROM ESTABLISHING MEANINGFUL GUIDANCE TO ITS WARDS WITH RESPECT TO THE ABORTION DECISION.

In holding Connecticut's Abortion Services regulation unconstitutional and in issuing its permanent injunction the District Court demolished Connecticut's abortion procedure and substituted a mandate which left a negligible role in these decisions for the appellant Commissioner and his successors. Concededly the broad discretion which the appellant hitherto exercised exceeded the bounds approved by the

majority of this court. It does not follow, however, that he should be enjoined from exercising any effective control over abortion decisions at all. So long as the boundaries of permissible State involvement are unclear, the State should have a greater measure of opportunity to experiment in devising new procedures to safeguard the best interests of its wards.

CONCLUSION

There are at least two reasons why the questions presented by this appeal are sufficiently substantial as to require plenary consideration:

1) The State's role in insuring medically safe conditions for abortions performed on its minor wards must be affirmed.

2) The constitutionally permissible role of a guardian, in participating in the decision of his minor ward to have, or not to have, an abortion needs to be settled by this Court.

Respectfully submitted,

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APPENDIX A

FILED

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U.S. District Court
Hartford, Conn.

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

LADY JANE, ET AL., by their next friends, individually, and on behalf of all others similarly situated

v.

EDWARD W. MAHER, individually, and as Commissioner of Welfare for the State of Connecticut, ET AL.

CIVIL NO. H-74-347

BEFORE: Anderson, Circuit Judge, Blumenfeld and Newman, District Judges

MEMORANDUM OF DECISION

BLUMENFELD, District Judge:

This case comes before this three-judge court on a complaint challenging the Abortion Services regulation[1] of the

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[1] The regulation as set forth in Manual Vol. 3, Chapter III, reads in relevant part:

"275 *Abortion Services*

An abortion may be performed on a patient only when medically necessary and after the legal consent to such procedure has been obtained.

Therapeutic abortion services within the State are covered under Title XIX when all the following conditions are met:

Connecticut State Welfare Department which requires that all minors committed to the care of the Commissioner of Children and Youth Services obtain the written consent of the Commissioner, in his capacity as legal guardian,[2] before having elective abortions.

I. Class Action and Mootness

Plaintiffs bring this action on their own behalf and on behalf of all other minor pregnant women whose legal guardian is the Commissioner of Children and Youth Services, who desire an abortion but who have been refused consent by the Commissioner. The requirements of Rule 23(a) and (b)(2), Fed. R. Civ. P., are met.[3] Although the complaint does not limit the class to those minors who are within the first twelve weeks of pregnancy, that was the fact in the case of each

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1. The abortion is recommended as medically or psychiatrically necessary by the attending physician and the Chief of Obstetrics and Gynecology in accredited hospitals.
2. The written consent for the abortion is secured from the patient or her conservator, and in the case of a minor from the parent or guardian.

   In the case of a committed child, a written consent for the abortion is secured from the Welfare Commissioner, as guardian.
3. Prior authorization for the abortion is secured from the Division of Health Services, Welfare Department."

[2] Prior to April 1, 1975, the defendant Edward W. Maher, as Welfare Commissioner, was legal guardian of all persons who are state wards. Since that time Francis H. Maloney, as Commissioner of Children and Youth Services, has acted in that capacity. Conn. Gen. Stat. Ann. § 17-62(d) (1975).

[3] Rule 23(a), Fed. R. Civ. P. provides:

"(1) [T]he class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims . . . of the representative parties are typical of the claims . . . of the class, and (4) the representative parties will fairly and adequately protect the interests of the class."

Rule 23(b)(2), Fed. R. Civ. P., provides:

"(2) [T]he party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole."

named plaintiff. Since the length of pregnancy is a significant factor, we certify the class as limited to those minor women whose pregnancy has not extended beyond the first trimester. *See Roe* v. *Wade*, 410 U.S. 113 (1973); *Doe* v. *Bolton*, 410 U.S. 179 (1973). Despite the fact that the named plaintiffs are no longer pregnant,[4] they "nonetheless retain the right to litigate the point because it is 'capable of repetition yet evading review.' *Roe* v. *Wade*, 410 U.S., at 124-125." *Planned Perenthood* v. *Danforth*, 44 U.S.L.W. 5197, 5216 (U.S. July 1, 1976). *See Sosna* v. *Iowa*, 419 U.S. 393, 399-403 (1975).

The plaintiffs contend that denial of consent to an abortion by the Commissioner as guardian violates certain clearly defined, constitutionally protected rights of the plaintiffs, and also, conflicts with Title XIX of the Social Security Act. We turn to their statutory claim first to consider whether it is necessary to reach the constitutional issue.[5]

II. The Statutory Claim

The plaintiffs contend that the Connecticut regulation requiring the Commissioner's consent to an abortion conflicts with the provisions of the Social Security laws dealing with medical assistance, 42 U.S.C. § 1396a, and with the Department of Health, Education and Welfare's regulation concerning family planning services, 45 C.F.R. § 220.21. However, as the Second Circuit noted in *Roe* v. *Norton*, 522 F.2d 928, 933,

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[4] Each of the plaintiffs named and the several others who later intervened received requested abortions after obtaining preliminary injunctions against the defendants' enforcement of the regulation from the district court.

[5] "That the three-judge court itself not only had jurisdiction but would have been obliged to adjudicate this statutory claim in preference to deciding the original constitutional claim in this case follows from *King* v. *Smith*, 392 U.S. 309 (1968), where, on an appeal from a three-judge court, we decided the statutory question in order to avoid a constitutional ruling. 392 U.S., at 312 n.3."

Rosado v. *Wyman*, 397 U.S. 397, 402 (1970).

935 (2d Cir. 1975), the Social Security laws do not deal with the subject of abortions and do not forbid a state welfare plan to distinguish between abortions which are voluntary from those which are medically necessary, so as to require Title XIX Medicaid for the latter, but deny them for the former. *Roe* v. *Norton, supra.* Sitting as a District Court, even as expanded to a panel of three judges, we are bound by the holding of our own circuit's Court of Appeals. *Nieves* v. *Oswald,* 477 F.2d 1109, 1112 (2d Cir. 1973); *Lewis* v. *Rockefeller,* 431 F.2d 368, 371 (2d Cir. 1970). We therefore must hold that the challenged regulation violates neither the Social Security Act nor the HEW regulation. Since this case cannot be disposed on the basis of the statutory claim, we must consider the constitutional claim.

III. Abstention

In *Bellotti* v. *Baird,* 44 U.S.L.W. 5221 (U.S. July 1, 1976), the Supreme Court held that a consent statute which might be construed as only a safeguard to assure that the minor's own decision was informed could be distinguished for constitutional purposes from one which establishes a veto power in the guardian. Faced with such a statute the Court remanded the case to the district court with instructions that it abstain pending an authoritative construction of the statute by the state courts. No such situation is present here. The defendants do not attempt to support the regulation by contending that it might be construed only to insure that the minor's consent to have the abortion performed is "informed." The regulation does not lend itself to such a construction, nor have the defendants ever used the regulation for that limited purpose. They have undeviatingly withheld consent in these and in similar earlier cases solely on the ground that it was against the state's "policy" to consent, and this case does not fall within any exception. "Abstention from the exercise of federal jurisdiction is the exception, not the rule." *Colorado River*

Water Conservation Dist. v. *United States,* 44 U.S.L.W. 4372, 4376 (U.S. Mar. 24, 1976).

IV. The Constitutional Issue

Our decision in this case has been postponed in order to await the decision on the appeal to the Supreme Court in *Planned Parenthood* v. *Danforth,* 392 F. Supp. 1362 (E.D. Mo. 1975), which dealt with the particular issue of whether a pregnant, unmarried minor's right to an abortion can be defeated by the refusal of her legal guardian to consent. That appeal has now been decided. 44 U.S.L.W. 5197 (U.S. July 1, 1976). In holding that an unmarried minor's right to an abortion is grounded in the Constitution as firmly as that of an adult woman, and that it cannot be frustrated by her guardian's denial of consent, the Court stated:

> "We agree with appellants and with the courts whose decisions have just been cited that the State may not impose a blanket provision, such as § 3(4), requiring the consent of a parent or person *in loco parentis* as a condition for abortion of an unmarried minor during the first 12 weeks of her pregnancy. Just as with the requirement of consent from the spouse, so here, the State does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy, regardless of the reason for withholding the consent."

44 U.S.L.W. at 5203-04.

The arguments put forward by the defendants in this case to justify the restrictive consent requirement are mirrored images of those which were thoroughly considered and rejected in *Planned Parenthood.* It would be superfluous to repeat the Court's discussion of them here. We hold that the

challenged regulation violates the first and fourteenth amendments of the Constitution and is therefore invalid.[6]

For the reasons set forth in Part IV of this opinion, the defendants are enjoined from requiring written consent of the Commissioner of Youth Services, as guardian, as a precondition to the performance of an abortion desired by any minor who is a ward of said Commissioner during the first trimester of her pregnancy.

SO ORDERED.

Dated at Hartford, Connecticut, this 21st day of September, 1976.

ROBERT P. ANDERSON
United States Circuit Judge

M. JOSEPH BLUMENFELD
United States District Judge

JON O. NEWMAN
United States District Judge

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[6] Although the "additional or alternative relief as may seem to the Court, to be just, proper, and equitable" for which the plaintiffs pray might be read to include a claim that the Commissioner should be ordered to pay the cost of voluntary abortions during the first trimester of pregnancy, no allegations making such a claim have been made in this case. It matters not, however, for in *Roe* v. *Norton*, 408 F. Supp. 660 (D. Conn. 1975) (522 F.2d 928 on remand) the Connecticut Welfare Department's Commissioner was enjoined on equal protection grounds from requiring, prior to the performance of an abortion, any form of approval as a condition for the reimbursement of the expenses of an abortion performed during the first trimester of pregnancy. 408 F. Supp. at 665.

APPENDIX B

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Hartford, Conn.

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

LADY JANE, by her next friend Margaret L. Penn, individually and on behalf of all others similarly situated

v.

EDWARD W. MAHER, individually and as Commissioner of Welfare for the State of Connecticut; FRANCIS H. MALONEY, individually and as Commissioner of Children and Youth Services for the State of Connecticut

CIVIL ACTION NO. H74-347

JUDGMENT

The above-entitled action came on for consideration by a Three-Judge United States District Court, the Honorable Robert P. Anderson, United States Senior Circuit Judge, and the Honorables M. Joseph Blumenfeld and Jon O. Newman, United States District Judges, presiding; and,

After a full hearing on the merits and after consideration of the papers submitted by the parties, the Court filed its Memorandum of Decision finding the Abortion Services regulation of the Connecticut State Welfare Department requiring

that all minors committed to the care of the Commissioner of Children and Youth Services obtain the written consent of the Commissioner, in his capacity as legal guardian, before having elective abortions invalid, being in violation of the First and Fourteenth Amendments to the Constitution of the United States;

It is therefore accordingly ORDERED and ADJUDGED that Judgment enter and hereby does enter finding the aforesaid Abortion Services regulation of the Connecticut State Welfare Department invalid, being in violation of the First and Fourteenth Amendments to the Constitution of the United States; and,

It is further ORDERED and ADJUDGED that the Defendants be and are hereby enjoined from refusing written consent to the performance of an abortion desired by any informed minor who is a ward of said Defendants during the first trimester of such minor's pregnancy.

Dated at Hartford, Connecticut, this 30th day of September, 1976.

SYLVESTER A. MARKOWSKI
Clerk, United States District Court

By: WILLIAM D. TEMPLETON
Deputy-in-Charge

Approved:

ROBERT P. ANDERSON
United States Circuit Judge

M. JOSEPH BLUMENFELD
United States District Judge

JON O. NEWMAN
United States District Judge

APPENDIX C

FILED
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U.S. District Court
Hartford, Conn.

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

LADY JANE, et als

Plaintiffs

v.

EDWARD W. MAHER, individually and as Commissioner of Social Services;
FRANCIS H. MALONEY, individually and as Commissioner of Children and Youth Services for the State of Connecticut.

Defendants

CIVIL NO. H74-347

November 3, 1976

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Edward W. Maher, Commissioner of Social Services of the State of Connecticut and Francis H. Maloney, Commissioner of Children and Youth Services of the State of Connecticut, the defendants above hereby appeal to the Supreme Court of the United States from the permanent injunction enjoining the defendants from refusing written consent to the performance of an abortion

desired by any informed minor who is a ward of said Defendants during the first trimester of such minor's pregnancy, entered in this action on October 7, 1976.

This appeal is taken pursuant to 28 U.S.C. Sec. 1253.

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APPENDIX D

Connecticut State Department of Social Services
Medical Assistance Program

Manual Vol. 3 — Chapter III

MEDICAL SERVICES

275 Abortion Services

The Department makes payment for abortion services under the Medical Assistance (Title XIX) Program when the following conditions are met:

1. In the opinion of the attending physician the abortion is medically necessary. The term "Medically Necessary" includes psychiatric necessity.

2. The abortion is to be performed in an accredited hospital or licensed clinic when the patient is in the first trimester of pregnancy. If the patient is *beyond* the first trimester of pregnancy, the abortion must be performed in an accredited hospital and the Chief of Obstetrics and Gynecology certifies in writing that the attending physician has hospital privileges and the abortion will be performed in that hospital.

3. The written request for the abortion is submitted by the patient, and in the case of a minor, from the parent or guardian.

In the case of a committed child, a written consent for the abortion is secured from the Commissioner of the Department of Children and Youth Services as guardian.

4. Prior authorization for the abortion is secured from the Chief of Medical Services, Division of Health Services, Department of Social Services.

Procedures

1. The hospital in which the requested abortion is to be performed, or the clinic which is licensed to perform abortions during the first trimester of pregnancy will submit Form W-217, "Letter Requesting Certification for Reimbursement Abortion", to Health Services in Central Office in which the attending physician certifies that the patient, parent or guardian has requested the performance of an abortion. This is signed by the attending physician in the accredited hospital or licensed clinic when the abortion is performed during the first trimester.

When the abortion is to be performed *beyond* the first trimester of pregnancy, the Form W-217a is completed by both the attending physician and the Chief of Obstetrics and Gynecology. The Chief of Obstetrics and Gynecology certifies that the attending physician has hospital privileges and that the abortion will be performed in that hospital.

2. In addition, Form W-601, "Request for Authorization for Professional Services" must accompany Form W-217 or Form W-217a and should include a statement indicating the medical need for the abortion.

For PA recipients and recipients of services from Unmarried Mothers program, the request will be reviewed by competent medical authority in the Division of Health Services in Central Office, and the hospital or clinic will be notified of the Department's decision by returning two (2) copies of Form W-601 to the hospital, maintaining one (1) copy for its own files.

For Committed Children, completed Forms W-601, 217 and 217a together with Social Data prepared by the D.C.Y.S. Regional Office are submitted to the Department of Children and Youth Services Central Office. Social Data includes all

pertinent background information regarding race, age of the individual, commitment date, the current situation and the individual's wishes and the specific medical necessity.

The packet will then be referred to the Division of Health Services for medical review and recommendation.

After review and recommendation by the Division of Health Services, the complete packet (Forms W-601, W-217 or W-217a and Social Data) will be returned to the Commissioner of Children and Youth Services for his review, decision and signing of the anesthesia permit if he consents to the abortion. If consent is given, Forms W-601, W-217 and W-217a are then returned to the Division of Health Services.

The hospital or licensed clinic is then notified by the Division of Health Services of the Department's decision by forwarding two (2) copies of Form W-601 to the hospital, maintaining one (1) copy for its own files. The Department of Children and Youth Services makes necessary arrangements for the individual's admission to the hospital.

Revised 9-15-75

APPENDIX E

EXCERPTS FROM ANSWERS TO INTERROGATORIES

5. Q. Do your departments have any policies, regulations, etc. that describe the procedure to be followed when a pregnant committed woman requests the defendants' approval for an abortion?

   A. Yes. Connecticut State Welfare Department Manual Vol. 3, Chapter III, Index 275. (See Appendix D)

9. Q. Has defendant Maloney adopted said policies, regulations, etc.?

   A. Yes, on April 1, 1975.

11. Q. State the names and title of all persons who participate in the review of requests for approval of abortions for committed women.

   A. Prior to April 1, 1975, the district social worker, case supervisor and DCW program supervisor, and John Ely, Director of Social Services, Dr. David Galinsky, Chief of Medical Services, and Edward W. Maher, Welfare Commissioner.

   Subsequent to April 1, 1975, the case worker or social worker, case supervisor, program supervisor, Regional Director, Deputy Commissioner Jeanette Dille, Dr. David Galinsky and Francis H. Maloney, Commissioner, Children and Youth Services.

12. Q. Are any formal or informal, written or unwritten guidelines or standards followed in reviewing re-

quests for approval of abortions desired by committed women?

   A. No.

18. Q. Is psychiatric or psychological information ever required?

   A. Yes.

19. Q. If the answer to number 18 is "yes", what psychiatric or psychological information is required?

   A. For a psychiatric evaluation, an examination by and a report of a psychiatrist is made.

   For a psychological evaluation, psychometric and projective testing is done by a psychologist.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

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No. 76-889

FRANCIS H. MALONEY
Commissioner of Children and Youth Services for the State of Connecticut,

Appellant,

v.

LADY JANE, ET. AL.,

Appellees,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

MOTION TO AFFIRM OR DISMISS

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March 18, 1977

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Pursuant to Rule 16 of the Rules of this Court, Appellees move to affirm the final judgment of the District Court on the ground that the question presented by this appeal is so unsubstantial as not to warrant further argument. In the alternative appellees move to dismiss this appeal since the appellant has changed the challenged regulation.

OPINION BELOW

The opinion of the three-judge District Court in this case is reported at 420 F. Supp. 318. It is also reprinted in Appendix A of Appellant's Jurisdictional Statement.

QUESTION PRESENTED

Whether the Connecticut Department of Social Services Abortion Services regulation, as set forth in Manual Volume 3, Chapter III, Section 275 (Jurisdictional Statement, Appendix D), which requires the written consent of the Commissioner of Children and Youth Services, as guardian, before an abortion can be performed for a state ward imposes a blanket consent provision that violates the First and Fourteenth Amendments to the United States Consitution.

STATEMENT OF THE CASE

This action was commenced in the District Court by the named plaintiff on October 29, 1974. Subsequently, eleven additional plaintiffs were permitted to intervene. At the time of her entrance into the case each plaintiff was a minor, having not yet attained the age of 18; was a ward of the State of Connecticut; was pregnant; with the currence of her physician desired to have an abortion; had requested the defendant's consent, as her guardian, for the abortion; and had been denied that consent. The named plaintiff and ten of the intervenors obtained temporary restraining orders which ordered the defendant

to refrain from refusing to consent in writing to the abortions requested by tne plaintiffs. The eleventh intervenor was voluntarily dismissed from the case before such an order was obtained. Each plaintiff had her abortion performed shortly after obtaining the order. Each plaintiff has been permitted to prosecute this suit in a fictitious name.

Connecticut General Statutes Section 17-62(d) provides, in part, that the Commissioner of Children and Youth Services, after April 1, 1975, or the Commissioner of Social Services, before April 1, 1975, is the guardian for all children (under 16 years old) and youth (16 and 17 years old) who have been committed to him by the Juvenile Court. The committed minors are commonly referred to as state wards.

The defendant was Nicholas Norton, Commissioner of Welfare, when this action was commenced. He left office on or about January 8, 1975, and was succeeded temporarily by Acting Commissioner John F. Harder. On or about February 1, 1975, Edward W. Maher became Commissioner of Welfare. On June 25, 1975, Public Act 75-420, Section 4 changed the name of the Department of Welfare to the Department of Social Services. On April 21, 1975, defendant Maloney was joined as a defendant since Public Act 74-251 amended Connecticut General Statutes Section 17-62(d), effective April 1, 1975, by vesting guardianship of all state wards in Maloney.

Following discovery, the District Court heard arguments on plaintiffs' motions to certify the class and for summary

Judgment on June 10, 1975. The District Court filed its Memorandum of Decision on September 21, 1976, (J.S., App. A) and Judgment on October 7, 1976, (J.S., App. B). The notice of appeal was filed on November 3, 1976, (J.S., App. C).

Connecticut has no statute which establishes a consent requirement before an abortion can be performed for a minor. However, it is a common practice for hospitals and physicians to require parental or guardian consent before an abortion is performed for a minor. The reason for this requirement is the doctors' fear of potential civil liability under a common law battery theory.

The challenged regulation was adopted by defendant Maloney (J.S., App. E) who has no formal or informal, written or unwritten guidelines or standards which are followed in reviewing requests for approval of abortions by state wards (J.S., App. E). The only standard for review of these requests is the medical judgment of David Galinsky, M.D., of the Division of Health Services of the Department of Social Services. Dr. Galinsky did not examine any of the plaintiffs. He is not an obstetrician gynecologist, psychiatrist or psychologist. (See excepts from Stipulation as to Facts which appears as Appendix A to this motion).

ARGUMENT

At the outset, appellees' counsel is obligated to advise this Court that the appellant has revised the challenged regul

tion, effective January 16, 1976, (See Appendix B). Fusari v. Steinberg, 419 U.S. 379 (1975), Concurring Opinion by Chief Justice Burger. Counsel first learned of this change subsequent to the District Court's decision when researching another case. This change was never communicated by appellant's counsel to the Court or to appellee's counsel. It should be noted that this revision is most likely invalid under Connecticut law since the procedures of the Uniform Administrative Procedure Act, Connecticut General Statutes Section 4-166 et. seq. were not followed.

The regulation challenged here clearly is a blanket provision such as the one that was struck down by this Court in Planned Parenthood of Central Missouri v. Danforth, ___U.S. ___, 44 L.W. 5197 (July 1, 1976).

Appellant argues that he should be allowed to participate in the decisions to have or not to have abortions that are made by his wards. Yet, he has never seen fit to promulgate standards by which to determine when an abortion should or should not be performed. He argues that proper medical care must be taken yet the record clearly indicates that his doctor who reviews each request for consent is not an obstetrician, gynecologist, psychiatrist or psychologist. Additionally his doctor never meets or examines the young women involved.

Assuming that a constitutional role for a guardian exist as the appellant contends, he has made no attempt to define t role with regulations. Further, he is so far removed from h wards that it is an extraordinary situation when he personal

knows one of them. He is so far removed from the young women that he has no contact with the physical and emotional trauma that they may experience in deciding whether or not to have an abortion. He is clearly not in the same position as a natural parent who has raised his or her daughter from birth.

CONCLUSION

For the reasons stated, it is submitted that the question presented is so clearly unsubstantial that the judgment of the District Court should be affirmed. Alternatively, since the challenged regulation has been revised, the appeal should be dismissed.

Respectfully submitted,

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March 18, 1977

APPENDIX A

EXCERPTS FROM STIPULATION AS TO FACTS

11. David Galinsky, M.D., of the Division of Health Services, Connecticut State Welfare Department, reviewed for medical sufficiency each plaintiff's request for approval of her abortion.

12. Doctor Galinsky did not personally examine any of the plaintiffs.

13. Doctor Galinsky is a gasteroenterologist (specialist in stomach and intestines). Doctor Galinsky is not an obstetrician, gynecologist, psychiatrist or psychologist.

14. The defendants have no formal or informal, written or unwritten guidelines or standards, other than Doctor Galinsky's medical judgment, that were used in reviewing plaintiffs' requests for approval of their abortions.